

Decision 04-12-010 December 2, 2004

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Southern California Edison Company (U 338-E) for Authority to Recover Capital Additions to its Fossil Generating Facilities Made Between January 1, 1997 and March 31, 1998 or the Date of Divestiture for Those Generating Facilities Divested by July 8, 1998 and Related Substantive and Procedural Relief.

Application 99-04-024
(Filed April 19, 1999)

**OPINION GRANTING INTERVENOR COMPENSATION
TO THE UTILITY REFORM NETWORK FOR
SUBSTANTIAL CONTRIBUTIONS TO DECISION 04-02-025**

This decision awards The Utility Reform Network (TURN) \$103,741.20 for its contribution to Decision (D.) 04-02-025.

Background

D.04-02-025 adopted \$52,216,000 in non-nuclear generation plant capital additions (hereinafter referred to as capital additions) for Southern California Edison Company (Edison) that were added to rate base in 1997 through July 8, 1998. Pub. Util. Code § 367¹ provides the standard and requirements for an electric utility to receive cost recovery through the competition transition charge (CTC) for capital additions incurred after 1995. D.97-09-048 adopted an after-the-fact reasonableness review to determine whether, and how much, utilities should

¹ All references are to the California Pub. Util. Code unless otherwise noted.

recover for post-1995 capital additions. The reasonableness review mechanism allowed Edison to make the capital additions prior to resolution of ratemaking treatment. Edison made capital additions to oil and gas fired plants that Edison later sold at a net gain or a net loss, and to plants that Edison retained, including coal-fired and hydroelectric plants.

Edison filed this proceeding to recover \$83,153,000 in capital additions made between 1997 and July 8, 1998. Edison segregated the capital additions into six categories: 1) reliability and obsolescence projects, 2) regulatory compliance requirements, 3) maintenance of a safe working environment, 4) Federal Energy Regulatory Commission (FERC) hydroelectric requirements, 5) new market structure metering, and 6) projects required for divestiture of fossil-fired generation facilities. TURN and the Office of Ratepayer Advocates (ORA) filed protests to Edison's proposed ratemaking treatment for certain capital additions. TURN and ORA argued that the capital additions did not comply with Pub. Util. Code § 367,² and the standards established by D.97-09-048. Following hearings in March 2000, the Legislature amended Section 377 in January 2001 to require that utilities retain any plant not yet divested, and to prohibit the disposal of retained generation plant until January 1, 2006. On October 2, 2001, Edison and the Commission entered into a Settlement Agreement that established new balancing accounts including the Non-Nuclear

² Section 367 provides that capital additions made during a transition period must be those necessary to maintain the facilities through December 31, 2001. The transition period anticipated that generation plants would be sold pending the beginning of a competitive electric market.

All references are to the California Pub. Util. Code unless otherwise noted.

Generation-related Capital Additions Memorandum Account (NGCAMA), which records amounts for taxes and returns on the capital additions through December 31, 2001.

On September 9, 2002, capital additions related to reliability and obsolescence projects in retained plants were removed from this proceeding and addressed in Application (A.) 02-05-004, Edison's general rate proceeding. The total amount of capital additions considered in A.02-05-004 was \$30,937,000, and the amount of capital additions considered in this proceeding was \$52,216,000.

D.04-02-025 adopted in full Edison's requested capital additions of \$52,216,000, including \$31,782,000 for environmental, regulatory, safety, and FERC relicensing projects, \$10,528,000 for oil and gas plants divested at a net gain, and \$9,906,000 for oil and gas plants divested at a net loss. D.04-02-025 allowed recovery of environmental, regulatory, safety, and FERC relicensing capital additions, as TURN and ORA reviewed these capital additions and did not disagree with their recovery. D.04-02-025 also allowed recovery of capital additions in divested plants, finding that these capital additions contributed to the reliability and maintenance of plant through December 2001. These costs were disputed by TURN. As a result of D.04-02-025, Edison was authorized to recover the return and taxes on capital additions that were recorded in a separate account.

On March 22, 2004, TURN filed an application for rehearing of D.04-02-025 which remains is pending.

On April 15, 2004, TURN filed its request for compensation for its substantial contribution to D.04-02-025. TURN requests \$103,651.20 in attorney fees, expert witness costs, and other costs.

Requirements for Awards of Compensation

The intervenor compensation program, enacted by the Legislature in Pub. Util. Code §§ 1801-1812, requires California jurisdictional utilities to pay the reasonable costs of an intervenor's participation if the intervenor makes a substantial contribution to the Commission's proceedings. The statute provides that the utility may adjust its rates to collect the amount awarded from its ratepayers.

All of the following procedures and criteria must be satisfied for an intervenor to obtain a compensation award:

1. The intervenor must satisfy certain procedural requirements including the filing of a sufficient notice of intent (NOI) to claim compensation within 30 days of the prehearing conference (or in special circumstances, at other appropriate times that we specify). (§ 1804(a).)
2. The intervenor must be a customer or a participant representing consumers, customers, or subscribers of a utility subject to our jurisdiction. (§ 1802(b).)
3. The intervenor should file and serve a request for a compensation award within 60 days of our final order or decision in a hearing or proceeding. (§ 1804(c).)
4. The intervenor must demonstrate "significant financial hardship." (§§ 1802(g), 1804(b)(1).)
5. The intervenor's presentation must have made a "substantial contribution" to the proceeding, through the adoption, in whole or in part, of the intervenor's contention or recommendations by a Commission order or decision. (§§ 1802(i), 1803(a).)
6. The claimed fees and costs are comparable to the market rates paid to experts and advocates having comparable training and experience and offering similar services. (§ 1806.)

For discussion here, the procedural issues in Items 1-4 above are combined, followed by separate discussions on Items 5 and 6.

Procedural Issues

The prehearing conference (PHC) in this matter was held on July 1, 1999. TURN did not file its NOI until August 18, 1999,³ but TURN sought and received permission from assigned Administrative Law Judge (ALJ) Linda Bytof for its late filing. This ALJ ruling also found TURN to be a “customer” under the Public Utilities Code. TURN filed its request for compensation on April 15, 2004, within the required 60 days of D.04-02-025 being issued. In its NOI, TURN asserted financial hardship based on a finding of significant financial hardship made in a ruling in A.98-09-003 et al., dated January 4, 1999. Based on that ruling, it was determined that TURN had a rebuttable presumption of eligibility for compensation in other Commission proceedings commencing after January 4, 1999 and before January 4, 2000. This proceeding was filed on April 19, 1999, and no reason appears to question the presumption, so we affirm the ruling that TURN is eligible for intervenor compensation.

TURN has satisfied all the procedural requirements necessary to make its request for compensation. We also note that no protests to TURN’s request for compensation have been received.

Substantial Contribution

In evaluating whether a customer made a substantial contribution to a proceeding we look to the intervenor compensation statute. First, did the ALJ or

³ Pub. Util. Code § 1804(a)(1) provides that an NOI must be filed and served within 30 days after the PHC.

Commission adopt one or more of the factual or legal contentions, or specific policy or procedural recommendations put forward by the customer? (See § 1802(i).) Second, where another party took a position similar to the customer's did the customer's participation materially supplement, complement, or contribute to the presentation of the other party or to the development of a fuller record that assisted the Commission in making its decision? (See §§ 1802(i) and 1802.5.) The Commission must exercise judgment in making these determinations.

In assessing whether the customer meets this standard, the Commission typically reviews the record, composed in part of pleadings of the customer and, in litigated matters, the hearing transcripts, and compares it to the findings, conclusions, and orders in the decision to which the customer asserts it contributed. It is then a matter of judgment as to whether the customer's presentation substantially assisted the Commission.⁴

Even where the Commission does not adopt any of the customer's recommendations, compensation may be awarded if, in the judgment of the Commission, the customer's participation substantially contributed to the decision or order.⁵ For example, if a customer provided a unique perspective that enriched the Commission's deliberations and the record, the Commission could find that the customer made a substantial contribution. With this guidance in mind, we turn to the claimed contributions TURN made to the proceeding.

⁴ D.98-04-059, 79 CPUC2d, 628 at 653.

⁵ See D.03-12-019, discussing D.89-03-063 (31 CPUC2d 402) (awarding San Luis Obispo Mothers for Peace and Rochelle Becker compensation in the Diablo Canyon Rate Case because their arguments, although ultimately unsuccessful, forced the utility to thoroughly document the safety issues involved).

As TURN notes, we did not adopt TURN's position on the disputed capital additions in this proceeding. Over 80% of TURN's total requested compensation was incurred in 1999 and 2000, at a time when there was uncertainty over the ultimate disposition of the disputed capital additions. Later events, including the amendment of Section 377, the adoption of the Edison settlement agreement, and the transfer of certain capital additions to A.02-05-004, affected the capital additions at issue in this proceeding. Therefore, our review recognizes that TURN committed resources and engaged consultants to review the application, and prepare and provide testimony, before circumstances beyond TURN's control changed many matters that affected the ultimate outcome in this proceeding. TURN analyzed over \$30 million of capital additions on reliability and maintenance projects in retained plants that ended up under consideration in A.02-05-004, and are addressed in a different decision. As it is not possible to separate time for this work, time related to the transferred capital additions performed prior to September 2002 is considered here.

TURN states that although the final decision did not adopt TURN's position on Edison's capital additions, TURN substantially contributed to D.04-02-025 in a number of ways. First, TURN notes that D.04-02-025 specifically states that the case-by-case analysis by TURN and ORA of Edison's capital additions was invaluable to the Commission in reaching its decision.⁶ TURN argues that it substantially contributed to the development of the record, including analyses regarding payback periods and treatment of heat rate improvement. TURN points out that its testimony explained Edison's change

⁶ See D.04-02-025, p. 15.

from a 20-year payback period to a ten-year payback period for certain capital additions. As a result, and as we discuss in more detail later, Edison withdrew its request for the cost recovery of some capital additions. Thus, in addition to TURN's significant review of all capital additions, TURN substantially contributed to the development of the record, particularly matters addressing Edison's payback period, and heat rate improvements.

Finally, TURN provided us with a substantial contribution in correcting several issues and policies addressed in the original proposed decision, and the revised decision. In the original decision, TURN pointed out that certain capital additions were incorrectly categorized, and other capital additions were insufficiently justified. In the revised decision, as a result of TURN's comments, the Commission corrected certain findings of cost- effectiveness, and findings on the recovery of environmental, regulatory, safety, and relicensing capital additions. We find that although many of TURN's positions were not adopted, TURN made a substantial contribution to D.04-02-025.

After we have determined the scope of a customer's substantial contribution, we then look at whether the compensation requested is reasonable.

Reasonableness of Requested Compensation

TURN requests \$103, 651.20⁷ for its participation in this proceeding, as follows:

Attorney Fees: Robert Finkelstein

24.25 hours @ \$265 per hour (1999)	= \$ 6,426.25
151.25 hours @ \$280 per hour (2000)	= 42,350.00
13.75 hours @ \$310 per hour (2001)	= 4,262.50
43.25 hours @ \$365 per hour (2003 and 2004)	= 15,786.25
11.5 hours @ \$182.50 per hour ⁸	= <u>2,098.75</u>
Subtotal	= \$ 70,923.75

Expert Witness Fees-JBS Energy, Inc.

William Marcus - 31.83 hours @ \$150 per hour	= \$ 4,774.50
Jim Helmich – 235.65 hours @ \$110 per hour	= 25,921.50
JBS expenses	= <u>357.50</u>
Subtotal	= \$ 31,053.50

Other Reasonable Costs

Photocopying Expenses	= \$ 1,382.80
Fax and Phone Costs	= 173.24
Postage/Fed Ex costs	= 75.88
LEXIS Research costs	= <u>132.03</u>
Subtotal	= \$ 1,763.95
Total	= \$103,741.20

⁷ TURN's compensation request contains a mathematical error so the table sums to \$103,741.20.

⁸ Preparation of TURN's intervenor compensation request at 50% of 2003 hourly rate.

The components of this request must constitute reasonable fees and costs of the customer's preparation for and participation in a proceeding that resulted in a substantial contribution. Thus, only those fees and costs associated with the customer's work that the Commission concludes made a substantial contribution are reasonable and eligible for compensation.

To assist us in determining the reasonableness of the requested compensation, D.98-04-059 directed customers to demonstrate productivity by assigning a reasonable dollar value to the benefits of their participation to ratepayers. The costs of a customer's participation should bear a reasonable relationship to the benefits realized through their participation. This showing assists us in determining the overall reasonableness of the request.

TURN's participation was productive in that its initial testimony resulted in Edison's withdrawal of three projects from rate recovery of approximately \$420,000. In addition, TURN challenged another Edison project of approximately \$274,000⁹ that was later withdrawn by Edison during the hearings.¹⁰ Taken together these amounts substantially exceed TURN's compensation request. TURN also provided other less tangible benefits to D.04-02-025. TURN notes that the original proposed decision incorrectly addressed certain capital additions, resulting in modifications to the revised proposed decision. Finally, TURN's work highlighted the analyses Edison performed on project cost-effectiveness, and potential deficiencies and thus made a substantial contribution to the development of the record. In total, TURN's efforts were productive.

⁹ See Exhibit 300, p. 43.

¹⁰ See RT Volume 4, pp. 403-404.

Next, we must assess whether the hours claimed for the customer's efforts that resulted in substantial contributions to Commission decisions are reasonable. This proceeding covered a number of years during which TURN spent time responding to various ALJ rulings, and commenting on two proposed decisions. Thus, TURN's claimed hours are spread over the period between 1999 and 2004. TURN documented its claimed hours by presenting a daily breakdown of the hours of its attorney, accompanied by a brief description of each activity. TURN also requests consultant hours spent by its expert witnesses in 1999 and 2000, and related consultant expenses. TURN documents the expert witness hours by a daily breakdown, also accompanied by a brief description of each activity. The hourly breakdown reasonably supports the claim for total hours by both the TURN attorney and the expert witnesses. Although we have not adopted TURN's recommendations on the central issues in this proceeding, we find that all of TURN's efforts made a substantial contribution to D.04-02-025 and therefore, we do not exclude any hours from TURN's award as a result of a different outcome than that proposed by TURN.

Finally, in determining compensation, we take into consideration the market rates for similar services from comparably qualified persons. The Commission has previously approved the rates sought for work performed by Finkelstein in 1999,¹¹ 2000,¹² 2001,¹³ and 2003.¹⁴ TURN requests the same rate for work in 2003 and 2004, but reserves the right to ask for a different rate for work

¹¹ See D.00-02-038, p. 16.

¹² See D.00-11-002, pp. 6-7.

¹³ See D.02-06-070, p. 21.

¹⁴ See D.03-08-041, p. 7.

in 2004 in another compensation request. The Commission has previously approved the rate for work performed by Marcus in 1999 and 2000.¹⁵ The rates requested for Finkelstein and Marcus remain reasonable.

TURN requests an hourly rate of \$110 for Helmich for work performed in 1999-2000. The Commission approved an hourly rate of \$100 for Helmich for work performed in 1997-98, and \$150 per hour for work performed in 2003.¹⁶ Given these previously approved rates for Helmich, the hourly rate of \$110 for work performed in 1999 and 2000 is reasonable.

Other Costs

TURN requests \$1,753.95 in other expenses (photocopying, fax, and phone costs, postage, and Lexis research). Our review of the submitted expenses in relationship to the number and size of filings by TURN in the proceeding, the detailed analysis required for project review, and the amount of work performed by TURN's attorney, leads us to conclude that these other requested costs are reasonable.

¹⁵ See D.00-02-008 and D.00-05-006.

¹⁶ See D.04-02-020, p. 9.

Award

As set forth in the table below, we award TURN \$103,741.20.

Finkelstein:

24.25 hours @ \$265 per hour	= \$ 6,426.25
151.25 hours @ \$280 per hour	= 42,350.00
13.75 hours @ \$310 per hour	= 4,262.50
43.25 hours @ \$365 per hour	= \$ 15,786.25
11.5 hours @ \$182.50 ¹⁷ per hour	= <u>2,098.75</u>
Subtotal	= \$ 70,923.75

Consultant Costs

William Marcus 31.83 hours @ \$150 per hour	= \$ 4,774.50
Jim Helmich 235.65 hours @ \$110	= 25,921.50
Expenses	= <u>357.50</u>
Subtotal	= \$ 31,053.50

Other Costs

Photocopying expense	= \$ 1,382.80
Fax/Phone costs	= 173.24
Postage/Fed Ex costs	= 75.88
Lexis Research costs	= <u>132.03</u>
Subtotal	= \$ 1,763.95
Total	= \$103,741.20

Consistent with previous Commission decisions, we order that interest be paid on the award amount (at the rate earned on prime, three-month commercial

¹⁷ Preparation of compensation request at 50% of normal hourly rate.

paper, as reported in Federal Reserve Statistical Release H.15) commencing June 29, 2004, the 75th day after TURN filed its compensation request and continuing until full payment of the award is made. The award is to be paid by Edison, the regulated entity in this proceeding.

We remind all intervenors that Commission staff may audit their records related to this award and that intervenors must make and retain adequate accounting and other documentation to support all claims for intervenor compensation. TURN's records should identify specific issues for which it requested compensation, the actual time spent by each employee, the applicable hourly rate, fees paid to consultants, and any other costs for which compensation was claimed.

Waiver of Comment Period

This is an intervenor compensation matter. Accordingly, as provided by Rule 77.7(f)(6) of our Rules of Practice and Procedure, we waive the otherwise applicable 30-day comment period for this decision.

Assignment of Proceeding

Loretta M. Lynch is the Assigned Commissioner and Bruce DeBerry is the assigned ALJ in this proceeding.

Findings of Fact

1. TURN made a substantial contribution to D.04-02-025.
2. TURN requested hourly rates for attorneys and experts that are reasonable when compared to the market rates for persons with similar training and experience.
3. The total of the reasonable compensation is \$103,741.20.

Conclusions of Law

1. TURN has fulfilled the requirements of Pub. Util. Code §§ 1801-1812, which govern awards of intervenor compensation, and is entitled to intervenor compensation for its claimed compensation incurred in making substantial contributions to D.04-02-025.

2. TURN should be awarded \$103,741.20 for its contribution to D.04-02-025.

3. Per Rule 77.7(f)(6), the comment period for this compensation decision may be waived.

4. Today's decision should be made effective today so that TURN may be compensated without further delay.

O R D E R

IT IS ORDERED that:

1. The Utility Reform Network (TURN) is awarded \$103,741.20 for its substantial contributions to Decision 04-02-025.

2. Within 30 days of the effective date of this decision, Southern California Edison Company (Edison) shall pay TURN's total award.

3. Edison shall also pay interest on the award beginning June 29, 2004, at the rate earned on prime, three-month commercial paper as reported in Federal Reserve Statistical Release H.15, and continuing until full payment is made.

4. The comment period for today's decision is waived.

This order is effective today.

Dated December 2, 2004, at San Francisco, California.

MICHAEL R. PEEVEY
President

CARL W. WOOD
LORETTA M. LYNCH
GEOFFREY F. BROWN
SUSAN P. KENNEDY
Commissioners

Compensation Decision:	D0412010
Contribution Decision(s):	D0402025
Proceeding(s):	A9904024
Author:	ALJ DeBerry
Payer(s):	Southern California Edison Company

Intervenor Information

Intervenor	Claim Date	Amount Requested	Amount Awarded	Multiplier?	Reason Change/Disallowance
The Utility Reform Network	4/15/04	\$103,651.20	\$103,741.20	No	arithmetic error

Advocate Information

First Name	Last Name	Type	Intervenor	Hourly Fee Requested	Year Hourly Fee Requested	Hourly Fee Adopted
Robert	Finkelstein	Attorney	The Utility Reform Network	\$265	1999	\$265
Robert	Finkelstein	Attorney	The Utility Reform Network	\$280	2000	\$280
Robert	Finkelstein	Attorney	The Utility Reform Network	\$310	2001	\$310
Robert	Finkelstein	Attorney	The Utility Reform Network	\$365	2003/2004	\$365
William	Marcus	Economist	The Utility Reform Network	\$150	1999/2000	\$150
Jim	Helmich	Economist	The Utility Reform Network	\$110	1999/2000	\$110